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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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TIMOTHY WESTHOUSE,

Plaintiff,

Robert M. Marshall
CLERK-SANTA FE

vs.

No. CIV 99-584 LCS

**JUDITH BOVA, individually and in her
capacity as a Public Defender with the New
Mexico State Public Defender's Office;
PHYLLIS H. SUBIN, in her capacity as Chief
Public Defender for the State of New Mexico;
and the STATE OF NEW MEXICO,**

Defendants.

MEMORANDUM OPINION AND ORDER


THIS MATTER came before the Court on Defendants' Motion to Dismiss Complaint for Failure to State a Claim (*Doc. 7*), filed September 3, 1999. The Court has reviewed the Motion, Defendants' accompanying memorandum, and the related authorities. Defendants' motion is well taken and will be granted.

Defendants' attorney certified that the Motion and supporting memorandum were mailed to Plaintiff's attorney on August 10, 1999. *See* Motion to Dismiss (*Doc. 7*) at 2; Mem. in Supp. (*Doc. 8*) at 4. Plaintiff has not responded to the motion. Failure to supply a response constitutes consent to grant the motion. *See* D.N.M. LR-Civ. 7.5(b).

Defendants' motion is also well taken on the merits. As a public defender, Defendant Bova was not acting under color of state law for the purposes of 42 U.S.C. § 1983 when performing her services as Plaintiff's attorney. *See Polk v. Dodson*, 454 U.S. 312, 325 (1981). Therefore, the civil

rights claims against Bova must fail. To the extent that Defendant Subin is being sued based on *respondeat superior* liability as Chief Federal Public Defender, those claims must also fail. See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Finally, the claims against the State of New Mexico must fail because a state is not a "person" for the purposes of 42 U.S.C. § 1983. See *Will v. Michigan Dep't of Pub. Safety*, 491 U.S. 58 (1989).

WHEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim (Doc. 7) is granted. A final order in accordance with Rule 58 of the Federal Rules of Civil Procedure shall be entered.


UNITED STATES DISTRICT JUDGE

F:\Brian\99-584 dismiss